IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2021-001674
First-tier Tribunal No: PA/11294/2018

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 24th October 2022

Decision & Reasons Promulgated
On the 22nd February 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

AJ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins, instructed by Sentinel Solicitors
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal ("FtT") Judge Shakespeare ("the judge") dated 19th July 2021 dismissing the appellant's appeal against the decision of the Secretary of State dated 7th September 2018 refusing his asylum and humanitarian protection claim.

The appeal was allowed on human rights grounds (Article 8) owing to the concession of exceptional circumstances by the Secretary of State.

2. The appellant is a national of Pakistan born on 13th April 2008 and is currently the subject of a special guardianship order granted by the Family Court at Luton on 24th October 2019 which places him under the care of his half-uncle Mr WA and his wife Ms YW until he reaches of age of 18. The appellant arrived in the UK on 15th February 2015 at the age of 6 on a child accompanied visa, valid until 30th June 2015; he was accompanied by his paternal grandmother. He claimed asylum on 16th June 2015. He asserted he had a well-founded fear of persecution in Pakistan on the basis of his membership of a particular social group (as a child) because he faced a real risk of serious harm from his stepfather in Pakistan.

3. The Secretary of State did not accept he had been threatened by his stepfather and concluded there were no substantial grounds for believing that the appellant faced a real risk of serious harm on return and refused the appellant asylum and humanitarian protection. The respondent also considered the application under the family and private life Rules under Appendix FM and paragraph 276ADE of the Immigration Rules. The appellant appealed under Section 82 of the Nationality, Immigration and Asylum Act 2022 ("the 2022 Act") on asylum and human rights grounds.

4. First-tier Tribunal Judge Shakespeare set out the legal framework and referred to **KB and AH (credibility-structured approach) Pakistan [2017] UKUT 491**.

5. The judge set out the appellant's bundles which included statements from the appellant, his half-uncle and his half-aunt, together with two CPINs relating to Pakistan and further objective evidence relating to Pakistan. There was also the judgment of HHJ Gargan dated 24th October 2019, which set out the reasons for granting a special guardianship order by the Family Court on 24th October 2019 (permission was granted by the Family Court for consideration in the immigration proceedings).

6. The judge had regard to the Senior President's Tribunal Practice Direction 2008 on child, vulnerable adult and sensitive witnesses [22].

7. At the hearing the Secretary of State's representative confirmed that the respondent had decided to grant the appellant 30 months' leave outside the Rules on the basis of exceptional circumstances. The appellant's solicitors had written to the Tribunal giving notice under Section 104(4B) of the 2002 Act but as leave had not yet been granted on the Article 8 ground because that ground was only conceded at the First-tier Tribunal hearing, a further Section 104(4B) notice was served following the proceedings being transferred to the Upper Tribunal and on direction from the Upper Tribunal.

8. At the FtT hearing it was asserted by Mr WA that the appellant would be at risk from his stepfather in Pakistan because he was very controlling. The mother had intermittent contact with the appellant and apparently was

aware of the proceedings. He confirmed the appellant's father had not contacted WA and the time that the appellant had been living with him.

9. In brief, the findings of Judge Shakespeare were as follows:

(i) He noted the respondent had conceded the Article 8 appeal.

(ii) He found the appellant was a member of a particular social group for the purposes of the protection claim.

(iii) He considered whether the appellant had a well-founded fear of persecution on the basis of his age. [39]. The judge had this to say:

> *"42. Whilst Mr A was an honest and credible witness, answering questions fully and candidly, by his own admission neither he nor Mrs Y W have any first-hand knowledge of the alleged events in Pakistan, and he is therefore largely reliant on what he has been told by the Appellant. Neither he nor his wife had had any recent contact with the Appellant's mother and had not spoken to the Appellant's step-father since the Appellant came to the UK. Neither the Appellant nor Mr A have provided any detail about the nature, timing or duration of the alleged abuse at the hands of his stepfather. There is no medical evidence before me."*

(iv) The judge found the assertion the appellant had been brought to the UK to escape his treatment in Pakistan was contrary to the evidence before him because on the appellant's evidence, "his grandmother brought him to the UK to give him a break from torture but they came to the UK as visitors with the intention of returning to Pakistan".

(v) Mr WA told the court he expected the appellant and grandmother to return after their visit.

(vi) The judge stated:

> *"43. Crucially, at QA.29 of the statement of evidence form Mr [W] A, on behalf of the Appellant, states the purpose of the trip was to 'visit family – at the point of travel [the Appellant] did not know that his life was in danger. It was only where his grandmother received a text message that things changed. This is supported by Mr [W]A's evidence that the intention was for the Appellant to visit family, consistent with the entry into the UK on a visitor visa."*

(vii) There was a negative NRM decision also in support of the argument that the appellant came simply to visit family and the judge found that overall, the appellant was not brought to the UK to escape mistreatment.

(viii) The judge found at [44] inconsistencies in the account of how the appellant and his family in the UK became aware of the alleged

threats. On the one hand WA received a text message from the appellant's mother but WA also made reference to the relatives in Southampton receiving the text message from the grandmother.

(ix) No indication the stepfather had made any contact or had any interest in the appellant.

(x) The mother made intermittent phone calls. The judge at [45] did not accept that she made a call from a friend or neighbour's house because the "appellant's stepfather is violent and controlling still less that the stepfather is a risk to the appellant's life". As WA told the judge, the mother did not have a phone of her own and the telephone system was not reliable in parts of Pakistan.

(xi) The judge considered the judgment of HHJ Gargan and noted he was invited to give significant weight to the findings and to note that he must apply a lower standard of proof than that applied in the care proceedings. The judge said this:

> *"[46] I am satisfied on what I have been told that from the family law perspective he would be at very real risk of suffering significant physical and emotional harm if sent back to Pakistan, particularly to his mother and her new husband'. However, as HHJ Gargan expressly acknowledges in this paragraph, her decision is made 'from the family law perspective' and she is careful not to overstep the limits of her jurisdiction. At paragraph 8 she says, 'I am told that his stepfather regards him … as the cuckoo in the nest and will seek to do harm if he remains in that household'. <u>However, she goes on to say 'I do not know if that is the situation'.</u> In m view, HHJ Gargan does not make specific findings of fact on the risk faced by the Appellant from his stepmother in Pakistan, but rather summarises what she has been told by the Appellant and his family. This is not necessarily surprising because the proceedings before HHJ Gargan were care proceedings; she had to decide whether to impose a Special Guardianship Order placing the Appellant under the care of Mr and Mrs A. That involves a different legal framework and different considerations to the protection appeal before me. A key concern for HHJ Gargan was the ability of Mr and Mrs A to meet the Appellant's care and welfare needs and the ability of his mother to care for him whilst in Pakistan. That is not the question before me, and has in any event, been determined by HHJ Gargan in the judgement of 24 October 2019. The careful and considered decision of HHJ Gargan is of course of persuasive value in the determination of this appeal. However, for the reasons set out above in my view it concerns a different legal framework involving a different factual emphasis and therefore I am not persuaded that it provides a basis for a finding that there is real risk that the Appellant will face*

persecution at the hands of her stepfather. Looking at the evidence in the round I am not persuaded that the Appellant has established to the lower standard that he is at risk form his stepfather. Therefore, I do not accept that he has established a well-founded fear of persecution if he were returned to Pakistan."

(xii) The judge considered at [48] and [49] the background material in relation to child abuse in Pakistan but continued at [49]:

"[49] However, I consider that in the context of the evidence as a whole, and given the lack of any other independent evidence of abuse and the inconsistencies summarised in my findings above, the evidence in the round does not prove the Appellant's account to the lower standard."

Grounds of Appeal

10. The appellant submitted that there were series of material errors within the determination making the decision unsustainable:

(1) The judge was simply incorrect to discount WA's evidence relying on **ML (Nigeria) v the Secretary of State for the Home Department [2013] EWCA Civ 844** which stated at [16] "a material error of fact is an error as to a fact which is material to the conclusion".

(2) Although the appellant himself did not give evidence, his statement detailed the abuse and trauma and that was not properly or adequately considered and was effectively ignored by the judge.

(3) The approach to the text messages was irrational on the part of the judge. It was irrational to paint the different family members receiving two different texts as being inconsistent.

(4) It was irrational to make an adverse finding on this basis of lack of contact from the stepfather, because it was difficult to understand what possible benefit the stepfather might achieve in contacting the appellant.

(5) This was unwarranted speculation in relation to the reason for the mother making the phone calls as she did to the appellant away from the family home.

(6) The judge's approach to HHJ Gargan was fundamentally flawed and was contrary to **RS (immigration and family law proceedings) India [2012] UKUT 00218 (IAC)** which held that the Immigration Court would be informed by the Family Court's assessment of the child's welfare and the judge misread and discounted and paid inadequate care to the judgment.

(7) The background material. The judge accepted that the material showed that the child abuse was commonplace in Pakistan

and the judge accepted it was capable of supporting the appellant's account, but then disregarded it.

11. At the hearing before the Upper Tribunal Mr Collins submitted that the judge had dismissed the account of WA because it was largely reliant on the child and that was an error.

12. He referred to **A (A Child) [2020] EWCA Civ 731**, which he acknowledged held that a Family Court is not bound to take, even as a starting point, a previous assessment or a determination of risk. A Family Court must respect any determination of the First-tier Tribunal IAC/UT in respect of a risk in a country of return. Paragraph [27] of A (A Child) held that the assessment of a risk by one court or a Tribunal may be a relevant consideration for a subsequent assessment by a different court. At [36] it was not said that the exercises performed in each of the jurisdictions were the same and the statutory schemes under which they operated were substantially different and driven by different policy considerations and it was acknowledged that the functions of the Family Courts and the Immigration and Asylum Tribunals were "largely distinct and separate".

13. Mr Collins submitted that the judge accepted Judge Gargan's judgment as being persuasive. The error of approach was finding that the judge did not make specific findings of fact, which the judge had done. Having found it was highly persuasive the error was in departing from that decision and failing to adequately reason the departure and so erred in the analysis of the assessment.

14. Ms Ahmed submitted the case of **ML** was not an authority that supported the appellant's argument. There was no contradiction in the judge's finding of WA's evidence because he had not himself witnessed any abuse. In relation to ground 2, there was no medical evidence, and it was open to the judge at [42] to find as he did. The judge had dealt with the witness statements including that of the appellant. In relation to ground 3 rationality was a high threshold and this was merely a disagreement with the judge's finding.

15. Ground 4 was again a rationality challenge, but the judge had given adequate reasoning. It was obvious why the stepfather might wish to track down where the appellant was on the basis of his claim.

16. In relation to ground 5, this was not speculation on the part of the judge but was WA's evidence.

17. In ground 6, the appellant overlooked the fact that the judge needed to consider the premise that there was a different legal framework. It was said that Judge Shakespeare accepted the decision but then departed from it. The judge gave reasons and was not even departing from it. At [46] she referred specifically to the special guardianship proceedings and considered that from a family law perspective the child would be at risk. The decision of Judge Gargan was to place the child for his care and welfare needs. [46] showed a carful and detailed consideration by the judge and [2] of **A (A Child)** made clear there was a distinction between

the two jurisdictions. I was also referred to **GD (Ghana) [2017] Civ 1126** at [50] to [51]. First the decision was not binding and secondly there was no departure. Even if there were a departure, she gave reasons.

18. Finally, in relation to the last ground, 7, that argument overlooked [49] in the decision which acknowledged the background evidence and child abuse but stated that having looked at the evidence in the round, the appellant's account was not proved to below a standard.

19. Mr Collins replied that **Mohan** [16] and [17], where **RS (India)** was endorsed did not undermine their complaint that the judge, having accepted their submission of how the judgment of **Mohan** should be approached, misread it and that was clear from [46].

Analysis

20. In relation to the first ground, it was asserted that the judge made an error of fact, as it was said, having found WA to be an honest witness, the judge erred by simply discounting WA's evidence because he was largely reliant on what he had been told by the appellant. However, a careful reading of the decision, specifically at [42] and in the context of reading the whole decision, demonstrates the judge gave cogent and valid reasons for placing less weight on WA's evidence when finding that WA nor his wife had any "first-hand knowledge of alleged events in Pakistan". The judge did not ignore the evidence of this witness. Not only did the judge reason that WA was largely reliant on what he had been told by the appellant, which was a pertinent comment, but also that neither he nor his wife had any recent contact with the appellant's mother and had and not spoken to the appellant's stepfather. The judge additionally stated that neither WA nor the appellant had provided "any detail about the nature, timing or duration of the alleged abuse at the hands of his stepfather and further there was no medical evidence". The judge gave a variety of reasons for placing little weight on WA's evidence and the weight to be attributed to a witness is a matter for the judge. Nothing in this decision undermined the judge's reasoning even though he found WA to be an honest witness. That observation was not contrary to the judge's finding as to WA being honest.

21. Turning to ground 2, the judge clearly addressed the appellant's witness statement at [43] and indeed cited from his witness statement. He found, however, on sound reasoning, that the appellant's assertion, that he had been brought to the UK to escape his treatment in Pakistan, was contradicted by other witness evidence including the visa application which stated that the purpose of the visit was to visit family and that he was going to return to Pakistan. The judge also noted that there was a negative NRM decision and taking "all this together" did not accept that "the appellant was brought to the UK to escape mistreatment by this stepfather". It was also open to the judge to take into account his previous finding that there was no medical evidence [43].

22. The hurdle of irrationality in the decision, which is asserted at grounds 3 and 4 is high and simply not reached in order to undermine the findings by

the judge. It was clear, as Ms Ahmed submitted, that the evidence of WA as to his knowledge of the threats, referenced a text message from the appellant's mother but also a text mother from the appellant's grandmother and that it was not clear from the documents "when the appellant first raised with his family in the UK the issue of the alleged threats" [44]. It was entirely open to the judge to note that WA ''did not know whether the stepfather had tried to contact the appellant since he had arrived in the UK" (bearing in mind he had been here 6 years) and to note that the step-father had apparently not contacted the appellant but also had not showed any "interest in him". Bearing in mind the stepfather was supposed to be determined to obtain the title to the land and, as the judge recorded, was said to want to kill him, it might be expected that he would attempt some form of contact to establish the appellant's movements and this is not irrational on the part of the judge. Within the context of the remaining findings these criticisms go no way towards undermining the decision overall.

23. Ground 5 maintained speculation and thus an unsustainable finding as to why the mother made a telephone call from another house. It was stated that the mother made a call from another house because the appellant's stepfather was violent and controlling. The judge was entitled to make the finding, based on WA's evidence itself that because she did not have a phone of her own and the telephone system was not reliable in parts of Pakistan, that she called from another house for those reasons not because of the threat of violence. There was nothing speculatory about that finding.

24. Turning to the real substance of the challenge, at ground 6 it was submitted that the judge had accepted that the judgment of HHJ Gargan was persuasive and then departed from it, which was an error of law. The judge at [46] noted the submissions made by Mr Collins before the FtT. As recorded above, at [46], the judge cited paragraph 8 of Judge Gargan's decision where she recorded she was '*told*' that the stepfather regarded him as a cuckoo in the nest and would seek to do him "real harm if he remains in that household" but as Judge Shakespeare observe Judge Gargan also found "I do not know if that is the situation". It was stated that Judge Gargan did make specific findings as to risk, but the judge identified that Judge Gargan merely "summarised what she had been told by the appellant and his family". Judge Shakespeare acknowledged the different legal framework and different considerations and 'a different factual emphasis'. That was open to the judge.

25. **Mohan [2012] EWCA Civ 1363** at [17] confirms that it is not the case that "the hands of the Secretary of State and the First-tier and Upper Tribunals will be tied by the outcome of family proceedings. The two jurisdictions apply different tests". Judge Shakespeare acknowledged that she must apply a lower standard of proof than that applied by Judge Gargan. Having acknowledged the specific finding made by Judge Gargan at [33], that the appellant would be at 'very real risk of suffering significant physical and emotional harm if sent back to Pakistan', the judge

then found that Judge Gargan had clearly stated, with regard the claimed attitude and harm that the stepfather would inflict on the appellant, '*I do not know if that is the situation'*. It was therefore open to the judge to conclude that in the light of that qualification made by Judge Gargan, there were no specific findings which would bind Judge Shakespeare. As noted in **Mohan** the Family Court evaluates the best interests of the child in proceedings brought before it.

26. There was no indication that the recent decision of Judge Gargan was ignored by Judge Shakespeare. Albeit that it may be persuasive, the judge was entitled to direct herself, as she did, that she was not considering his "care and welfare needs and the ability of his mother to care for him whilst in Pakistan" which had been determined by Judge Gargan. Acknowledging the family court decision was of persuasive value in the determination of the appeal, the judge was right to observe that "it concerns a different legal framework involving a different factual emphasis" and therefore that she was not persuaded, in this jurisdiction, that it provided a basis for finding that there was a real risk that the appellant would face persecution or be at risk of significant harm.

27. In support of the judge's approach, the Senior President in Re A (A Child) considered the relationship between the two distinct jurisdictions, the family court and the Immigration and Asylum Chamber and underlined the very differing functions and approach between those two jurisdictions. Nothing in the approach by Judge Shakespeare contravenes that. As set out at [27] of **A (A child) [2020] EWCA 731:**

> '*We accept that an assessment of risk made by one court or tribunal may be a relevant consideration for a subsequent assessment by a different court or tribunal: but, whether it is relevant at all and, if so, the weight to be given to the earlier assessment, are matters for the subsequent court or tribunal. They will depend upon (among other things) the degree of similarity/difference between the precise assessment in which each court or tribunal is involved, the available relevant evidence and any particular rules (evidential or otherwise) that apply'.*

28. Not least, the judge was considering the evidence through an entirely different lens with the benefit of cross-examination of WA and a consideration of the statement of the appellant. The assessment of the facts was also taking place nearly two years on from the family court proceedings and clearly there would have been the development in the evidence since those proceedings. **A (A Child)** considered the relationship between the two distinct jurisdictions in the family court and the Immigration and Asylum Chamber of the First-tier Tribunal. It was concluded that the family court was not constrained by any prior conclusion of the FtT IAC and could give such weight as it might consider appropriate of its own assessment. The Senior President at [1] noted that the President of the family court had rejected the Secretary of State's submission that an FtT assessment must be the "starting point" and the court should only deviate from the FtT assessment if there was good

reason to do so. There was no indication that Judge Shakespeare failed to have regard to all of the circumstances even if she made reference to the fact Judge Gargan's view was persuasive, and findings had been made.

29. The Immigration and Asylum Chamber, like the family court, has a duty to form its *own* assessment when applying the different test in different proceedings. That is what Judge Shakespeare noted. The Senior President at [17] explained with reference to **Re A (A Child)** [2016] EWCA Civ 988 the difference in approach to a family case and the approach taken in the Immigration and Asylum Tribunal, where material must be looked at "as a whole with a view to determining whether there is a well-founded fear of persecution or substantial grounds for believing that a person would fail as a real risk of serious harm". That is what Judge Shakespeare did.

30. It was accepted in **Re A (A Child)** that there could be overlap between the issues, but paragraph 36 also undermines the grounds of challenge here. It was specifically rejected that the 'exercise performed in each of the jurisdictions' was the same and particularly noted that 'Even the factual issues and assessments are not the same'.

> '*Indeed, such assistance as there is in the authorities indicates that the functions of the family courts and the immigration and asylum tribunals are largely distinct and separate: see Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363, [2013] 1 WLR 922 approving the Upper Tribunal in RS (immigration and family court proceedings) India [2012] UKUT 218 (IAC) per McFarlane LJ, Blake J. (President) and Upper Tribunal Judge Martin. As Black LJ remarked in Re H supra, even the approach to the exercise of judgement or risk evaluation is different. Furthermore, by section 55 of the Borders, Citizenship and Immigration Act 2009, the interests of a child are not paramount in the tribunal, they are a primary issue that does not take precedence over other issues. That of itself necessarily constrains the tribunal from understanding questions of risk in the same way as the family court where a child's welfare is paramount (assuming as in this case, the application being made is in respect of a child)'.*

31. The judge took into account Judge Gargan's findings, was not bound by them, and even if she were (which clearly, she was not), gave reasoned explanation for her own assessment of the evidence and any departure. Judge Gargan, as the judge stated, was deciding whether to impose a special guardianship order and even if Judge Gargan did make specific findings of fact, on risk faced by the appellant, from his stepfather in Pakistan, the judge made her own evaluation taking into account Judge Gargan's decision some two years on and on different evidence.

32. The judge had the benefit of oral evidence before her, and appeal courts are serially reminded not to interfere with a trial judge's conclusions on primary facts unless satisfied the judge was clearly wrong.

33. Reading the decision carefully overall the challenge at ground 7 is not made out. At [49] the judge clearly acknowledged the background evidence and the child abuse recorded as prevalent in Pakistan but stated that having looked at the evidence in the round, the appellant's account was not proved to the lower standard. The appeal was allowed in relation to human rights on Article 8 grounds only. Nothing in the grounds discloses a material error of law on the part of the judge and the challenge is dismissed.

Notice of Decision

34. I find no material error of law and the FtT decision will stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant as a minor, is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Helen Rimington Date 21st December 2022

Upper Tribunal Judge Rimington